Office-Supreme Court, U.S.
FILED
JAN 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LINDA FLEISHMAN,

Petitioner,

VS.

ELI LILLY AND COMPANY, E.R. SQUIBB & SONS, WINTHROP LABORATORIES AND THE UPJOHN COMPANY,

Respondents.

BRIEF OF RESPONDENT E.R. SQUIBB & SONS, INC. IN OPPOSITION

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Counterstatement of Question Presented

1. In the absence of invidious discrimination and the presence of a rational relationship to legitimate state concerns, do the equal protection and the due process provisions of the Fourteenth Amendment to the Constitution of the United States render the application of the New York statute of limitations unconstitutional?

List of Parties

The list of parties is set forth in Petitioner's Brief at page ii.

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LINDA FLEISHMAN,

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VS.

ELI LILLY AND COMPANY, E.R. SQUIBB & SONS, WINTHROP LABORATORIES AND THE UPJOHN COMPANY,

Respondents.

BRIEF OF RESPONDENT E.R. SQUIBB & SONS, INC. IN OPPOSITION

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent, E.R. Squibb & Sons, Inc., respectfully prays that the petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on June 12, 1984 be denied.

Opinions Below

The opinions below are set forth in the Appendix submitted by petitioner, Linda Fleishman.

Jurisdiction

The basis upon which petitioner has invoked the jurisdiction of this Court is set forth on page 2 of the petition submitted by Linda Fleishman.

Constitutional Provision Involved

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state . . . shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Counterstatement of the Case

E.R. Squibb & Sons, Inc. ("Squibb")* submits this brief in opposition to the petition of Linda Fleishman ("petitioner") for a writ of certiorari to the Court of Appeals of the State of New York from an Order of the New York State Court of Appeals affirming an Order of the Appellate Division, Second Department, entered August 1, 1983, affirming a Judgment, entered on April 15, 1982 in the Supreme Court, Queens County (Kassoff, J.), which dismissed her action against all four respondents herein as having been brought beyond the time permitted by New York law.

In her action, petitioner sought to recover damages from Squibb and three other pharmaceutical manufacturers for personal injuries which she alleged were caused by her mother's ingestion of the drug diethylstilbestrol - "DES" -

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*The subsidiaries of Squibb are listed in the appendix submitted herewith.

while pregnant with plaintiff in or about 1955*(Petitioner Br. 3). The drug was apparently prescribed to prevent spontaneous abortion or miscarriage.**

Squibb, as did each of the other three respondents, raised the defense of the statute of limitations in its verified answer to the complaint. Respondent The Upjohn Company moved for summary judgment upon the ground that the action was barred by the statute of limitations, and Squibb and Respondents Eli Lilly and Company and Winthrop Laboratories cross-moved for similar relief.

On December 10, 1981, by memorandum decision, Justice Edwin Kassoff granted Respondents' motions (Petitioner App. 21a-28a).

Justice Kassoff decided that a cause of action for drug-related injuries, which it is claimed appear after an extended latency period, accrues on the date the drug enters the body. Justice Kassoff, noting that "[i]t is only through the mother's ingestion of the drug and its eventual absorption by the fetus that the plaintiff can claim damages against DES manufacturers," determined the last date of injury to plaintiff must be deemed to have occurred no later than her birth on March 29, 1955 (Petitioner App. 26a). Applying the tolling provisions of the applicable statute of limitations, Justice Kassoff concluded that the last date for plaintiff to bring her action was September 1, 1977, over two years before she commenced this action (Petitioner App. 26a).

The Court of Appeals and the Appellate Division, Second Department in affirming the dismissal of plaintiff's action by the Supreme Court relied, as had Justice Kassoff, upon both

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*The following parenthetical references herein are to pages of the Petitioner's Appendix (Petitioner App.) and Petitioner's Brief (Petitioner Br.).

**A statistical association (not a causal connection) between the use of DES by a mother while pregnant and adenocarcinoma in the daughter of such a pregnancy was first claimed and published in 1971. *See* 284 New Eng. J. of Med. 879 (1971). Squibb disputes the validity of any such statistical association.

well-established and recently reaffirmed New York Court of Appeals opinions holding that, when injury is allegedly caused by a chemical compound, the statute of limitations begins to run upon exposure to the drug, and that this period of limitations cannot be extended absent legislative mandate.

Reasons for Denying the Writ

The decision of the Court of Appeals of the State of New York should not be reviewed by this Court. The New York State rule that a cause of action accrues upon exposure to an allegedly toxic substance has a rational relationship to legitimate state concerns; providing certainty to repose of claims and preventing litigation wherein necessary evidence may be lost or forgotten.

ARGUMENT

1

PETITIONER'S ASSERTION THAT DECISION BELOW VIOLATES FOURTEENTH AMENDMENT GUARANTEES IS WITHOUT MERIT BECAUSE THE DECISION IS BASED UPON A RULE HAVING A RATIONAL RELATIONSHIP TO LEGITIMATE STATE CONCERNS

a. Due Process

Statutes of Limitation have repeatedly been upheld as consistent with principles of due process. This Court has stated:

> On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which result in the finding of ultimate facts for or against the plaintiff by the judge

> or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Board of Regents v. *Tomanio,* 446 U.S. 478, 487 (1980) (holding that New York Statute of Limitations barred the assertion of civil rights and Fourteenth Amendment claims).

Petitioner claims that a guarantee of effective access to the courts exists and is denied by the operation of the statute of limitations (Petitioner Br. 7). However, this Court has held that the United States Constitution does not guarantee access to courts for redress of every injury. *See Ortwein* v. *Schwab,* 410 U.S. 656 (1973); *United States* v. *Kras,* 409 U.S. 434 (1973); *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). Moreover, plaintiff's tort claim is economic in nature. Because such a claim does not involve a fundamental right,* and no suspect classification, such as race or nationality, is present, *Ortwein* v. *Schwab,* 410 U.S. at 660 (1973); *Montgomery* v. *Daniels,* 38 N.Y.2d 41, 60, 378 N.Y.S.2d 1, 17 (1975), the statute must have only a rational relation to a legitimate state policy in order to withstand constitutional attack based on due process grounds. *United States* v. *Kras,* 409 U.S. at 446 (1973); *see also Ortwein,* 410 U.S. at 660.

Because the state interest in assuring the repose of claims and preventing litigation requiring use of "stale" evidence is

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*The cases cited by petitioner in support of her claim that a guaranteed right of access to the Courts exists, arose out of "fundamental" constitutional claims, *Bounds* v. *Smith,* 430 U.S. 817 (1977) (prisoner's right to petition courts); *Hilliard* v. *Scully,* 537 F. Supp. 1084 (S.D.N.Y. 1982) (prisoner's right to petition court); *Spock* v. *United States,* 464 F. Supp. 510 (S.D.N.Y. 1978) (right of privacy), as opposed to tort claims.

rationally related to the determination that the cause of action accrues at the time of ingestion, petitioner has not been deprived of due process.* *See Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 237 N.Y.S.2d 714, *remittitur amended,* 12 N.Y.2d 1073, 239 N.Y.S.2d 896, *cert. denied,* 374 U.S. 808 (1963); *see also Pitts* v. *Unarco Industries Inc.*, 712 F.2d 276 (7th Cir.), *cert. denied,* *U.S.* , 78 L. Ed. 2d 698 (1983) (upholding Indiana statute of repose which barred an asbestos claim); *Bunker* v. *National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982), *appeal dismissed,* 460 U.S. 1076 (1983) (holding Indiana statute requiring action be brought within three years of last exposure to asbestos constitutional).

b. Equal Protection

Plaintiff claims that accrual of a cause of action at the time of exposure violates equal protection of laws because it arbitrarily selects and protects a class of manufacturers while depriving claimants of a right to bring suit (Petitioner Br. 17). This is not true. The Fourteenth Amendment only forbids invidious discrimination. Invidious discrimination is "a classification which is arbitrary, irrational and not reasonably related to a legitimate purpose." *United States ex rel. Buonoraba* v. *Commissioner of Correction,* 316 F. Supp. 556, 564 (S.D.N.Y. 1970). However, discussing the operation of statutes of limitations, this Court has stated:

> [s]tatutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them' .... These

*The cases cited by petitioner in support of her assertion that the accrual of a cause of action at the time of ingestion is unreasonable involve reasonable statutory, not due process, analyses. *Urie* v. *Thompson,* 337 U.S. 163 (1949) (application of statute of limitations to FELA Action); *Ricciuti* v. *Voltarc Tubes, Inc.,* 277 F.2d 809 (2d Cir. 1960) (analysis of applicable Connecticut statutes of limitations in diversity action).

> enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. *Kubrick,* 444 U.S. 111, 117 (1979) (citations omitted); *accord McCarthy* v. *Volkswagen of America, Inc.,* 55 N.Y.2d 543, 547-549, 450 N.Y.S.2d 457, 459-460 (1982); *Schwartz,* 12 N.Y.2d at 218, 237 N.Y.S.2d at 718; *Schmidt* v. *Merchants Despatch Transportation Co.,* 270 N.Y. 287, 302, *reh'g denied,* 271 N.Y. 531 (1936).

In New York, the rationale supporting the accrual of a cause of action at the time of ingestion is twofold:

> First, if the substance is harmful, its injection begins to set in motion the ultimate injurious effect. Thus, the injury is the introduction of the harmful substance into the body, not the ultimate harm which ensues. Second, when a harmful substance is injected, it is diffused into the body's biological network. At the time the action is commenced no remnants of the substance itself remain. It will not be possible to discern the method of injection, the personnel involved or even the identity of the substance itself without reverting to testimonial evidence or the examination of records, either of which may require the recall of events which are long past. Since a major purpose of Statutes of Limitation is the prevention of claims the proof or defense of which require 'stale' evidence, there is significant policy support for the running of the Statute of Limitations from the date of injection of a harmful substance such as a cancer-producing drug or dust.

Martin v. *Edwards Laboratories,* 112 Misc. 2d 93, 96, 446 N.Y.S.2d 182, 184 (Sup. Ct. Erie County 1982), *modified,* 91

A.D.2d 1172, 459 N.Y.S.2d 142 (4th Dep't), *rev'd,* 60 N.Y.2d 417, 469 N.Y.S.2d 923 (1983); *see Schwartz,* 12 N.Y.2d at 218, 237 N.Y.S.2d at 718; *Schmidt,* 270 N.Y. at 302; *see also Johnson* v. *Eli Lilly and Co.,* 577 F. Supp. 174 (W.D.Pa.), *aff'd,* 738 F.2d 422 (3rd Cir. 1983), *cert. denied,* U.S. , 83 L. Ed.2d 118 (1984) (upholding application of New York statute of limitations barring DES claim). Therefore, because the rule is rationally related to a legitimate state concern, petitioner has not been deprived of equal protection as guaranteed by the Constitution.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Respondent E.R. Squibb & Sons, Inc. is a subsidiary of Squibb Corporation.

The subsidiaries of E.R. Squibb & Sons, Inc. are:

Laboratorios Linson, S.A. Productos Farmaceuticos
E.R. Squibb & Sons (Pty.) Limited
Eleventh Extension (Pty.) Ltd.
Orthopaedic Appliances (Pty.) Ltd.
Modern Invalid Aids (Pty.) Ltd.
Salonpas (Australia) Pty. Ltd.
Ausmedex Pty. Ltd.
Squibb S.A.
Squibb Industria Quimica, S.A.
Laboratorio Sanitas, S.A.
Fundo Squibb de Incentivo a Ciencia
Squibb Canada, Inc.
Linson, Inc.
Squibb ApS
E.R. Squibb & Sons Limited
Convatec Limited
Squibb Europe Limited
Squibb Medical Systems Limited
Kingsdown Medical Products Ltd.
OLMACO, S.A.
SOCIETE FRANCHISE DE COMPLEMENTS ALIMENTAIRES S.A.
Squibb Europe Services, S.A.
Squibb (Far East) Limited
Squibb Pacific Ltd.
Synbiotics Limited
Squibb (Ireland) Limited
Squibb Industries (Taiwan) Ltd.
Linson Investments Limited
F.A.I.R. Laboratories Limited
Squibb Surgicare Limited
Linson Limited
Squibb International S.A.

Squibb Medical Systems (Far East), Inc.
Squibb Medical Systems International, S.A.
Squibb Medical Systems GmbH
Squibb Medical Systems N.V./S.A.
Industrial Linson, S.A.
Laboratoires Convatec S.A.R.L.
Squibb Sociedad Anonima Industrial y Comercial
Squibb Farmaceutica Portuguesa Limitada
Heyden Farmaceutica Portuguesa Limitada
Squibb Development Limited
Squibb A.G.
P.T. Squibb Indonesia
Squibb (Thailand) Limited
Bentley Fragrances Pty. Limited
Squibb/Novo, Inc.
Squibb/Connaught, Inc.
Ritz Corporation Pty. Limited
Feneco S.A. de D.V.
Novicos Cosmetic G.m.b.H.
Cullen y Asociados S.A.
Inmobiliaria Culmex, S.A.
Cullen Asociados S.A.
Lawrence Laboratories Ltd.
Fray, S.A.
Swords Biotreatment Limited
Swords Laboratories Limited

Apart from E.R. Squibb & Sons, Inc., the other subsidiaries of Squibb Corporation are:

Squibb Middle East S.A.
Squibb Japan Inc.
E.R. Squibb & Sons de Mexico S.A. de C.V.
Squibb B.V.
Squibb of Bangladesh Limited
Squibb-Mathieson International Corporation
E.R. Squibb & Sons (N.Z.) Limited
Squibb Hellas L.L.C.

Squibb A.E.B.E. Pharmaceutical Products Industry
Linson Chemicals, S.A.
Von Heyden Gesellschaft Mit Berschrankter Haftung
Agit Verlag GmbH
Elektrochemische Gesellschaft Hirschfelde GmbH
Unterstutzungskasse de Chemische Fabrik von Heyden
AG Munchen GmbH
Von Heyden Gesellschaft GmbH
Squibb Sud S.p.A.
Laboratoires Squibb S.A.
Squibb Industria Farmaceutica, S.A.
Medicamentos y Productos Quimicos, S.A.
Sociedad Inmobiliaria y de Construcciones S.A.
Carlos E.A. Muller, S.A.
Tallosa, Sociedad Anonima
Laboratorio Farmaceutico Squibb, S.A.
E.R. Squibb & Sons Phillippines Corporation
R.C.S. Realty Corporation
Squibb Laboratories (Proprietary) Limited
Squibb Aktiebolag
E.R. Squibb & Sons Inter-American Corporation
Manufactureros Quimicos Farmaceuticos S.A.
Squibb Europe Inc.
Squibb Medical Systems International, Inc.
Squibb Medical Systems Europe, Inc.
E.R. Squibb & Sons, Inc.
Squibb Pacific Corporation
HUMACO HOLDINGS, Inc.
Squibb Manufacturing, Inc.
SQB Leasing Corporation
ERS Advertising, Inc.
Squibb Diagnostic Services, Inc.
Association of International Medical Sciences, Inc.
Squibb Overseas Investments, Inc.
Ersana, Inc.

Renasa, Inc.
Squibb S.p.A.
Supplemental Enterprises, Inc.
Edward Weck & Company, Inc.
Back-Mueller, Inc.
Crescent Manufacturing Company
J.K. Hoppl Corporation
Surgicot, Inc.
Surgicot of Puerto Rico, Inc.
Squibb Pakistan Ltd.
Argon Medical Corporation
Argon International, Inc.
Sterilization Laboratories, Inc.
Larry Appolito, Inc.
Humanicare International, Inc.
Britt Corporation
Charles of the Ritz Group Ltd.
A.B. Niwako
Alexandra de Markoff Sales Corporation
Bentley Marketing Services Pty. Limited
Charles of the Ritz, A.G.
Sanre Inc.
Charles of the Ritz Limited
Charles of the Ritz, S.A.
Feneco S.A.C.I.
Parfums Yves Saint Laurent S.A.
Yves Saint Laurent Parfums Corp.
Ritz Corporation
LCR Pan American, Inc.
Gianni Versace Parfums Corp.
Prestige Fragrance & Cosmetics, Inc.
SBN Realty, Inc.
Squibb Corporation of Puerto Rico, Inc.
Squibb International Finance N.S.
Squibb Investments S.A.
Burgess Hill Insurance Co. Limited
Squibb Medical Systems Group, Inc.

Advanced Technology Laboratories, Inc.
Advanced Technology Laboratories International, Inc.
Advanced Technology Laboratories Sales Corporation
Spacelabs, Inc.
Spacelabs (Europe), Inc.
Spacelabs International, Inc.
Vita-Stat Medical Services, Inc.
Vita-Stat Systems, Inc.
Instruments for Cardiac Research, Inc.
Squibb Properties, Inc.
LRS Lessors, Inc.
HD Corp. of Puerto Rico
HD 65, Inc.
Greenstreet Properties, Inc.
Dobbs of Puerto Rico
Squibb Vitatek Inc.
Advanced Diagnostic Research Corporation
ADR Ultrasound Proprietary, Ltd.
ADR International, Inc.
Diagnostic Technology, Inc.